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SUPREME COURT OF THE UNITED STATES

In Equity.

No. 325

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.,

Appellees.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

STATEMENT AS TO JURISDICTION.

The appellants, in support of the jurisdiction of the Supreme Court to review the above-entitled cause on appeal, respectfully represent:

(a) The Statutory Provisions Sustaining Jurisdiction.

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (U. S. C., Tit. 28, Sec. 345), provides as follows:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District

Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * * * *

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

The Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 219 (U. S. C., Tit. 28, Sec. 41 (28)), confers jurisdiction upon the District Court "of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." By the same Act, Ch. 32, 38 Stat. 220 (U. S. C., Tit. 28, Sec. 47a), review by the Supreme Court of decrees entered in such cases is provided as follows:

> A final judgment or decree of the District Court * * * may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

(b) **Date of Decree, and Date of Application for Appeal.**

The final decree sought to be reviewed was made and entered on June 4, 1935.

Application for appeal was presented on July 23rd, 1935, together with an Assignment of Errors.

(c) **Nature of the Case and Rulings of the Court Below.**

The appellants, the duly appointed and qualified receivers of a common carrier by railroad subject to the In-

terstate Commerce Act, filed with the Interstate Commerce Commission a tariff, known as I. C. C. No. A-6826, Sixth Revised Page 139, effective December 4, 1933, extending the switching limits of Fort Benning Junction, Georgia, a station on appellants' line, to include certain tracks within Fort Benning, an adjacent Military Post. On May 1, 1934, H. D. Pollard, as Receiver of the Central of Georgia Railway Company, filed a complaint with the Commission alleging that the tariff and the services rendered thereunder were unlawful, and asking the Commission to require its cancellation and order the appellants, among others, to cease and desist from asserted violations of law growing out of the use of said tariff. After due hearing and argument in the proceeding, designated as Docket No. 26483, the Commission under date of February 5, 1935, entered the following order:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said Commission in said report having found the provision of the Seaboard Air Line Railway Company Schedules, I. C. C. No. A-6826, Sixth Revised Page 139, effective December 4, 1933, that "Fort Benning Junction, Ga., switching limits include the receiving and delivery tracks at Fort Benning Military Post" to be unlawful:
>
> It is ordered, That Sixth Revised Page 139 of said Schedules, be, and it is hereby, stricken from the files of this Commission.
>
> By the Commission.
>
> [SEAL.] GEORGE B. McGINTY,
> *Secretary.*

Following the Commission's denial of a petition by appellants for reargument and reconsideration, appellants promptly filed their bill of complaint in the District Court of the United States for the Southern District of Georgia, asserting that the tariff in question was lawful, that the Commission's order, and the report incorporated therein, were based upon erroneous principles of law and exceeded the lawful powers of the Commission, and praying, among other things, for a decree perpetually enjoining the enforcement, operation and execution of said order, and that it be set aside and forever annulled.

The Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220 (U. S. C. A., Title 28, Section 47) provides in part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court, of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. * * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges * * * shall apply."

Pursuant to the requirements of this Act the Honorable William H. Barrett, upon the filing of the complaint herein, duly entered an order calling to his assistance to hear and

determine the cause the Honorable Samuel H. Sibley, United States Circuit Judge, and the Honorable Bascom S. Deaver, United States District Judge, and thereafter all proceedings below were had before, and the decree herein appealed from was made in its entirety by, the court of three judges so convened.

By authority of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150 (U. S. C. A., Title 28, Sec. 45a), the Interstate Commerce Commission and H. D. Pollard, as Receiver of the Central of Georgia Railway Company, intervened as defendants. The latter, as part of his answer, filed a counterclaim, praying that the appellants and their agents be enjoined from performing service to and from the tracks within Fort Benning and from using the aforementioned tariff without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as provided by paragraph (18) of Section 1 of the Interstate Commerce Act. Appellants thereupon filed a motion to strike the counterclaim on the grounds (1) that it was not properly pleadable under Equity Rule 30, (2) that it attempted to inject into a cause adjudicable only by a three judge court an issue cognizable only by a single judge, and (3) that it prayed affirmative relief, which, if granted, would directly affect and interfere with the possession, operation, and control of the properties of which appellants were receivers, and which was therefore within the exclusive jurisdiction of the courts of their appointment.

By final decree the court below declared the order of the Commission lawful and valid and denied the appellants' prayer that its enforcement, operation and execution be enjoined. The decree further denied and overruled appellants' motion to strike the counterclaim of H. D. Pollard, as Receiver, allowed said counterclaim, and granted the injunctive relief therein prayed.

Said decree and the ruling of the Court in support thereof present a case within the jurisdiction of the Supreme Court under the statutory provisions hereinbefore cited.

(d) Cases Believed to Sustain the Jurisdiction of This Appeal.

United States v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 306;

Louisville & Nashville R. Co. v. *United States*, 238 U. S. 1;

Virginian Ry. Co. v. *United States*, 272 U. S. 658;

Baltimore & Ohio R. R. Co. v. *United States*, 277 U. S. 291;

St. Louis & O'Fallon R. Co. v. *United States*, 279 U. S. 461;

United States v. *Chicago, M., St. P. & P. R. Co.*, — U. S. —, Adv. Ops., 55 Sup. Ct. Rep. 462, 79 L. Ed. 492.

Respectfully submitted,

W. R. C. Cocke,
Chas. T. Abeles,
J. Randolph Anderson,
Solicitors for Appellants.

Norfolk, Virginia, July 10th, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

SUPPLEMENTARY STATEMENT AS TO JURISDICTION.

W. R. C. COCKE,
CHAS. T. ARELLS,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 295

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.

SUPPLEMENTARY STATEMENT AS TO JURISDICTION.

The appellants, having heretofore presented their statement as to jurisdiction and otherwise complied with the requirements of Rule 12 of the Rules of the Supreme Court with regard to such statement, and desiring to clarify their position in respect of the jurisdiction of this Court to review certain parts of the final decree of the three judge statutory court from which this appeal is taken, respectfully represent:

1. The said decree, among other provisions, granted the relief prayed in the counterclaim filed as a part of the answer of H. D. Pollard, receiver, to the bill of complaint

in the court below by perpetually enjoining and restraining the appellants and their agents from operating the track between Fort Benning Junction, Georgia, and Fort Benning, Georgia, without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity as required by paragraphs (18), (19) and (20) of Section 1 of the Interstate Commerce Act, Part I, and from doing certain other acts and things incidental to such operation. In so decreeing the statutory court overruled the appellants' contention that the operation of said track by the appellants did not constitute an extension of the appellants' line of railroad for which a certificate of public convenience and necessity was required by paragraph (18) of Section 1 of said Act but fell within the purview of paragraph (22) thereof.

2. Although in this appeal the appellants have assigned the foregoing part of the decree of the statutory court as error, and have included such error in their statement of points to be relied upon, they are of the opinion that this Court is without jurisdiction to review on direct appeal a decree of injunctive relief which necessarily could be sought and granted only pursuant to paragraph (20) of Section 1 of the Interstate Commerce Act, Part I, but on the contrary that an appeal from such a decree must be first taken to the proper Circuit Court of Appeals.

3. Accordingly the appellants concurrently with the appeal taken to this Court also took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from that part of the decree of the statutory court granting the injunctive relief prayed for by the counterclaim of H. D. Pollard, receiver, and said appeal remains pending in that court.

In order, however, to preserve their right to a review of such part of said decree in the event this Court rules that

it has jurisdiction of a direct appeal from that aspect of the decree of the statutory court granting injunctive relief, the appellants have deemed it necessary to submit the issue thus framed to this Court by including such issue in their assignment of errors and statement of points to be relied upon, notwithstanding that they are of the opinion, as stated, that this Court has no jurisdiction to review the question on direct appeal.

4. If this Court decides that it has jurisdiction of the question, it follows that the appeal taken to the Circuit Court of Appeals should be dismissed. If this Court decides it does not have jurisdiction it may be necessary, for the proper protection of the appellants' legal rights, to prosecute their appeal in the Circuit Court of Appeals.

5. Appellants therefore pray that, if consistent with its practice in such matters, this Court, in determining the question of its jurisdiction on other aspects of the appeal to this Court, also determine and make known its decision upon the question of jurisdiction submitted by this supplementary statement.

Respectfully submitted,

W. R. C. COCKE,
CHAS. T. ABELES,
Counsel for Appellants.